82-190

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JAMES P. McDERMOTT, pro se, as

Petitioner

v.

ATTORNEY GENERAL OF THE UNITED STATES, et al.

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

James P. McDermott
1774 Eastburn Avenue
Bronx, New York 10457
Petitioner Pro Se

QUESTIONS PRESENTED

1. Whether the Court of Appeals has overlooked or misapprehended questions of law, or fact, including plain error apparent on the record, even in a civil case, the substantive evidence rule and the clearly erroneous rule to cause a miscarriage of justice.

2.a. Whether ministerial duty breached by District Court was sanctioned by Court of Appeals' (2nd Circuit) Orders (2) entered about March 13, 1981 denying petitioner's motions requesting certification of Constitutional questions and correction of the record of the District Court.

2.b. Whether the District Court has ministerial duty to permit all of plaintiff-appellant's papers to be entered in the docket chronologically by Rule 79., Fed. R. Civ. P. the same as per treatment

given to defendants.

3. Whether where Court's manner was prompted by wrong motives there is not only abuse of discretion but there has been no exercise of discretion on the merits.

4. Whether complaint filed under Sections 2201 et seq. of 28 U.S.C. is not simply dismissed where constitutional question exists and provides jurisdiction to the courts for declaration of rights further relief and creation of a remedy.

5. Whether a single judge of the District Court usurped the power of a 3-judge court and further abused power by usurping right to have jury hear issues in controversy. (Points I-IV)

6. Whether the absence of an evidentiary hearing, because factual dispute existed, was a denial of petitioner's

right to full and fair hearing under the equal protection component of the Fifth Amendment's Due Process Clause of the Constitution of the United States. (Points I-V).

7.a. Whether under the Emolument Clause claim (Article 1, section 9, the U.S. Constitution) and U.S. Statutes [22 U.S.C., Sections 804, 2621 and 2625 and 18 U.S.C., section 209(a)], emoluments such as the Nobel Prize of 1977 to employees of the Veterans Administration are constitutionally prohibited and subject to the jurisdiction of the Supreme Court in this case.

7.b. Whether human experimentation conducted in Veteran Administration hospitals is in violation of domestic human rights as guaranteed under the Ninth Amendment of the U.S. Constitution.

7.c. Whether the Consul General et al. of Sweden are subject to the constitutional prohibitions on emoluments such as the Nobel Prize.

LIST OF THE PARTIES

The petitioners herein are: JAMES P. MC DERMOTT, on behalf of himself and other similarly situated,

The respondants herein are: ATTORNEY GENERAL OF THE UNITED STATES; DIRECTOR OF CENTRAL INTELLIGENCE AGENCY; DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION; SECRETARY OF THE ARMY; SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; DIRECTOR OF THE NATIONAL BUREAU OF STANDARDS; DIRECTOR OF THE NATIONAL SECURITY AGENCY; SECRETARY OF STATE; SECRETARY OF THE TREASURY; SOLICITOR GENERAL; UNITED STATES POSTAL SERVICE; PRESIDENT OF THE UNITED STATES; THE UNITED STATES OF AMERICA; ADMINISTRATOR OF THE VETERANS ADMINISTRATION; THE CIVIL SERVICE COMMISSIONERS; SECRETARY OF THE DEPARTMENT OF ENERGY; COMMISSIONER OF INTERNAL REVENUE SERVICE; UNKNOWN PAST AND PRESENT OFFICERS AND AGENTS OF THE UNITED STATES; ROSALYN S. YALOW; CYRUS R. VANCE; DIRECTOR OF THE BRONX V.A. MEDICAL CENTER; EUGENE STRAUS; FRANK LOVELOCK; DANIEL STONE; HUGH BARBER; WILLIE MILLER; J.M. TORRES; "JOAN DOE" AS EXECUTRIX OF THE SOLOMON A. BERSON ESTATE; JOSEPH TEDESCO; STUMP: ALPERT; OPPENHEIMER; A.M. KLEINMAN; JULIUS WOLF; OVITZ; HOWARD FRIEDMAN; LAWRENCE FEINMAN; HENRY D. JANOWITZ; MARK A. KORSTEN; CHARLES S. LIEBER; HERBERT G. ROSE; MARTIN AMES; MORTON KARMIOL; UNKNOWN PAST AND PRESENT V.A. PHYSICIANS AND V.A. AGENTS; JONATHAN BINGHAM; D.P. MOYNIHAN; J.

JAVITS; HERMAN BADILLO; UNKNOWN PAST AND PRESENT CONGRESSMEN OF THE UNITED STATES; UNKNOWN PAST AND PRESENT OFFICERS AND AGENTS OF THE U.S. POSTAL SERVICE; DISABLED AMERICAN VETERANS (D.A.V.); JOHN REGAN; WILFRED PUENTES ESTATE EXECUTRIX; JAMES M. WATERS; CHARLES MC LEOD; UNKNOWN PAST AND PRESENT D.A.V. OFFICERS; D.A.V. NATIONAL ADJUSTANT AS CHIEF EXECUTIVE OF D.A.V.; DONALD T. FARLEY; ARTHUR P. WAGNER; UNKNOWN PAST AND PRESENT CONCULAR OFFICIALS OF THE UNITED STATES; CITY OF NEW YORK; MAYOR OF NEW YORK; EDWARD KOCH; COMMISSIONER POLICE DEPARTMENT OF THE CITY OF NEW YORK; UNKNOWN PAST AND PRESENT OFFICERS OF THE POLICE DEPARTMENT; ENVIRONMENTAL PROTECTION ADMINISTRATION ADMINISTRATOR; DEPARTMENT OF SANITATION COMMISSIONER: AARON YALOW; UNKNOWN OFFICERS AND AGENTS OF EPA AND THE DEPARTMENT OF SANITATION; COMMISSIONER DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT; DIRECTOR OFFICE OF RENT CONTROL; DANIEL W. JOY; ROBERT ZITNER; ELI SHUB; COMMISSIONER DEPARTMENT OF INVESTIGATIONS; MONICA BLUM; NICHOLAS SCOPPETTA; COMMISSIONER DIVISION OF VETERANS AFFAIRS; ROBERT J. DE SANCTIS; WILSON; DISTRICT ATTORNEY OF BRONX COUNTY; SANFORD GARELICK; ANTHONY BOUZA; BURTON ROBERTS; "JOHN DOES" OF THE CITY OF NEW YORK; BOARD OF HIGHER EDUCATION; CHANCELLOR OF CITY UNIVERSITY OF NEW YORK; THOMAS C. CHALMERS; PRESIDENT MOUNT SINAI SCHOOL OF MEDICINE; BERNARD J. BULKIN; CHAIRMAN CHEMISTRY DEPARTMENT; DAVID L. BEVERIDGE; JOSEPH DANNENBERG; CHARLES E. HECHT; KLAUS GROHMANN; LOUIS MASSA;

JACK HERZ; HENRY D. JANOWITZ; S. COSTELLO; CHANCELLOR AND UNKNOWN PAST AND PRESENT OFFICERS AND AGENTS OF THE BOARD OF REGENTS AND THE UNIVERSITY OF THE STATE OF NEW YORK; THE GOVERNOR; THE SECRETARY OF STATE; ROBERT ABRAMS; THE ATTORNEY GENERAL; COMMISSIONER OF EDUCATION; PRESIDENT OF THE UNIVERSITY OF THE STATE OF NEW YORK; THE KING OF SWEDEN; CONSUL GENERAL OF SWEDEN; KAROLINSKA INSTITUTE; NOBEL PRIZE TRUSTEES; UNKNOWN PAST AND PRESENT AGENTS OF THE NOBEL PRIZE COMMITTEE; CITIBANK, NA; PRESIDENT OF CITIBANK, NA AND BOARD OF TRUSTEES; CITICORP; UNKNOWN PAST AND PRESENT AGENTS OF CITIBANK, NA; CONSOLIDATED EDISON CO.,' N.Y.; CHARLES L. LUCE; PRESIDENT AND CHAIRMAN; THE BOARD OF TRUSTEES; UNKNOWN PAST AND PRESENT OFFICERS AND AGENTS OF CON EDISON; ANN-GUR REALTY CORPORATION; MARVIN YASGUR; VICTOR "DOE" AND UNKNOWN PAST AND PRESENT AGENTS OF ANNGUR REALTY; BRONX-LEBANON HOSPITAL CENTER; PRESIDENT FRED SILVERMAN; SCHAFFLER SECURITY V.P.; UNKNOWN PAST AND PRESENT OFFICERS AND AGENTS OF BRONX-LEBANON HOSPITAL CENTER; MONTEFIORE HOSPITAL AND MEDICAL CENTER; PRESIDENT MARTIN CHERAKASKY; MARY ANNE MULLEN AND UNKOWN PAST AND PRESENT OFFICERS AND AGENTS; ROCKEFELLER UNIVERSITY HOSPITAL; CHIEF PHYSICIAN; ATTALLAH KAPAS; NUALLAH AND UNKNOWN PAST AND PRESENT OFFICERS AND AGENTS OF ROCKEFELLER UNIVERSITY HOSPITAL FOR CANCER AND ALLIED DISEASES; PRESIDENT GLENN A WASSELMANN; MILDRED SKLENA; UNKNOWN PAST AND PRESENT OFFICERS AND AGENTS OF MEMORIAL HOSPITAL FOR CANCER

AND ALLIED DISEASES; NEW YORK UNIVERSITY; BOARD OF TRUSTEES; PRESIDENT OF NEW YORK UNIVERSITY; LYLE BORST; UNKNOWN PAST AND PRESENT OFFICERS AND AGENTS OF NEW YORK UNIVERSITY; ALBERT AND MARY LASKER FOUNDATION; PRESIDENT AND THE BOARD OF TRUSTEES OF LASKER FOUNDATION; MARY LASKER; UNKNOWN PAST AND PRESENT OFFICERS AND AGENTS OF THE LASKER FOUNDATION; UNITED STATES COURT OF APPEALS (2ND CIRCUIT); J. EDWARD LUMBARD; JON O. NEWMAN; ROBERT C. ZAMPANO; AMALYA L. KEARSE as judges thereof; UNITED STATES DISTRICT COURT (S.D.N.Y.); LLOYD F. MACMAHON as chief judge thereof; RAYMOND F. BURGHARDT as chief clerk thereof; ANDREW V. SCHALLY,

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Picket v. Travelers Indemnity Co., (1960) 283 F. 2d. 835.

Swift v. United States 316 U.S. 216, 86 L.Ed. 1391, 62 S. Ct. 948.

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Journal of Clinical Investigation, 1956, 35, 170.

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No. _____

IN SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JAMES P. McDERMOTT, pro se, as

Petitioner

v.

ATTORNEY GENERAL OF THE UNITED STATES, et al.
Respondents

PETITION FOR WRIT OF CERTIORARI

The petitioner, James P. McDermott, pro se, prays respectfully that the Court, in its discretion, grant a writ on the judgment entered on November 20, 1981.

[1]"et al." refers to the defendants originally captioned also in the Complaint filed in District Court, except herein includes proposed changes requested by motions; e.g., see "Amendment to Complaint" (filed 11-28-80 ret.

The judgment invoking certification was entered by the United States Court of Appeals on November 20, 1981. A petition for rehearing filed by the Petitioner herein on December 3, 1981, was denied by the Court of Appeals on January 28, 1982, and a notice of appeal was filed on February 24, 1982. Copies of said judgment, order and notice are appended hereto.

In addition, the two orders by the Court of Appeals during appellant's motions for Certification of Constitutional Questions and for Correction of the Record of the District Court, respectively, entered on March 2, 1981, are appended to invoke the writ, too.

As required by Rules 28.4(b) and 28.4(c) of the Rules of this Court, 28 U.S.C. secs. 2403(a) and 2403(b) may

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12-9-80) and et cetera. Appended herein as Appendix A is a transcription of said caption.

be applicable but no court of the United States, as defined by 28 U.S.C. sec. 451, has certified what was drawn in question.

JURISDICTION

This case is in the nature of a domestic human rights case and jurisdiction of this Court may be invoked under any of the following sections of Title 28, U.S. Code: 1254(1) and 1254(3) respectively. This application for certification of questions of law which have not been but should be settled by this Court also provides jurisdiction. Rule 17 of the Rules of this Court indicates that application for certification of the inferior Court's departure from accepted and usual course of judicial proceedings as to call for an exercise of the Supreme

Court's supervision provides jurisdiction.

PRELIMINARY STATEMENT

Seeking declaratory, and injunctive relief as well as money damages for violations of his civil rights plaintiff-appellant, acting pro se initiated this action in the U.S. District Court, Southern District N.Y. on April 15, 1980. The District Court (MacMahon, Ch. J.), by memorandum and order (entered on December 5, 1980) granted the government's motions and dismissed the complaint as frivolous with respect to the defendants and further certified that any appeal from said order in forma pauperis would not be taken in good faith. On December 31, 1980, plaintiff appealed the memorandum

and order as merely an interlocutory decision appealable as of right. Judgment was entered 10 days after the opinion was entered.

On December 22, 1980 plaintiff's motion under 28 U.S.C., Sec 1292 (b) and Rule 5(a) Fed. R. App. P. alleged that the District Court usurped the power reserved to a jury and therefore its decisions were interlocutory. Earlier, December 9, 1980, the plaintiff filed papers on "personal knowledge" and also filed motion for rehearing based on new evidence. In the judgment some of these motions were dismissed as moot, as was the earlier motion of November 28, 1980 requesting leave to serve an Amendment to Complaint.

As a further abuse of authority during pre-trial motions, all of the defendants were stayed by court order from responding to plaintiff-appellant's

requests for evidentiary admissions or requests for discovery of defendants' addresses.

Furthermore, the defendants pleaded no contradictory factual version of any issue raised by the plaintiff but they merely asserted the complaint was insufficient on its face as a matter of law; the district court impermissably accepted the defendant governments' general conclusory allegations of denial for the dismissal of the complaint.

In addition, the District Court by its irregular proceedings obstructed the clerks of the federal courthouse from entering the plaintiff-appellant's motions and papers in the court record ("docket sheet") a ministerial duty breached over plaintiff's continuous and continuing protests. Motions to make substantial corrections in the docket sheet were denied by "endorsement" dated

January 30, 1981 by the Chief Judge; similar motions in the Court of Appeals were denied about March 13, 1981. The Court of Appeals Orders of March 13, 1981 sanctions the impermissible proceedings of the Distrct Court in this action. The order of November 20, 1981 by the Court of Appeals sanctions every departure by the District Court from accepted and usual course of judicial proceedings as to call for exercise of the Supreme Court's power of supervision.

STATEMENT OF THE CASE

The defendants include the Consul General of Sweden et al., both individually and officially; the President of the United States both individually and officially; the United States of America, federal agencies thereof, present and former heads of

agencies, officers and agents, officially and individually, thereof; numerous agencies of the City and State of New York, heads of agencies, officers and agents, officially and individually, thereof; several proprietary hospitals, officers and agents, thereof; banking institutions officers and agents thereof; a public utility's officers and agents, thereof.

The defendants as physicians and providers of health care services for the Veterans Administration are alleged to have caused deprivation of the petitioner's right to personal liberty, personal security and proper medical treatment by conducting a campaign of human experimentation. The defendants were joined, or replaced, over an extended period of time by other defendants who conducted a cover-up campaign in violation of several

constitutional and statutory provisions, including, except not limited to, administration of counter-indicated medication willfully, perversely, passionately, maliciously, with reckless disregard, putting the plaintiff's life in jeopardy in 1965 and again during the period 1968-1970, resulting in three hospitalizations, with one rehospitalization, leaving morbidities therefrom.

This petition seeks certiorarie of constitutional issues of transcendental importance which affect the operation of the largest hospital system in the United States--the Veterans Administration Centers--and the federal court system of the United States; the decisions of the inferior courts, and of this Court, will have a vital effect on hospital patients in V.A. medical centers throughout the nation as well as in the federal courts;

the substantial rights of the petitioners are at stake and it would be manifestly unjust to deny petitioner an opportunity to file a petition for writ of certiorari.

The plaintiff was unknowingly the subject of a research type program (pulmonary chest surgery) in 1950 which recently was discovered to be research and intentionally disabling; it is alleged that the 1968-70 infamies were designed to cover up the research experiments commenced just after World War II in V.A. Hospitals. Recently these occurrences climaxed with the unconstitutional Nobel Prize of 1977 as an attempt to confuse the public with further cover-up.

The Nobel Prize of 1977 in medicine and physiology to Rosalyn Sussman Yalow of the Bronx Veterans Administration Hospital was based on the

"fruits" of fraudulent and criminal activities in the Veterans Administration and the said Nobel presentation in the class of "medicine and physiology" by Sweden in concert with the United States State Department and agents of the United States[2] is now and was when made in 1977 a false and fraudulent conspiracy and the named conspirators know it to be false.

These special and important questions arise on federal law and are of such character which should be settled by this Supreme Court but which have not been.

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[2]Point V of Appellant's Reply Brief before the Second Circuit partly reduced defendants in number. Further reductions under Court approval are required by Petitioner's logic. The final defendants do not affect the fundamental issues of interest to the Supreme Court.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS HAS OVERLOOKED OR MISAPPREHENDED QUESTIONS OF LAW, OR FACT, INCLUDING PLAIN ERROR OR LAW APPARENT ON THE FACE OF THE RECORD, EVEN IN A CIVIL CASE, THE SUBSTANTIVE EVIDENCE RULE AND THE CLEARLY ERRONEOUS RULE TO CAUSE A MISCARRIAGE OF JUSTICE.

Without explicitly so stating in its order, the Court of Appeals says in effect that the plaintiff-appellant's briefs contain no appellent argument. Concerning the brief the factual matters may not be a vehicle for argument except stigmatization of the plaintiff's case as "frivolous" or not made in good faith, as characterized by the district court's dismissal order of December 5, 1980, compelled the plaintiff-appellant to labor under an onerous burden, which attacked his credibility. As a result of said order plaintiff was made to misunderstand the issues for appeal.

Nevertheless as now understood

the Court of Appeals order of November 20, 1981 has substantially differed from the district court by removing the designation "frivolous" and makes no reference to good faith. The Nobel prize to a member of the Veterans Administration is acknowledged by the Court of Appeals as "among the grievances" which is an actual controversy between the parties.

Plaintiff asserts that at the oral argument in the Court of Appeals he did present issues of absence or fair trial in the District Court and impermissibly incomplete docketing of plaintiff's motions on the docket sheet by the District Court.

The Court may in the interest of justice notice plain error apparent on the record and would examine the record on matters not briefed or excepted to at oral argument. See e.g.

Montgomery v. Marva Theaters (1954) 218 F. 2d 221.

The court in its discretion may consider--points not argued and briefed in a civil case--plain error apparent on face of the record in order to avoid a miscarriage of justice or to resolve a question of public concern. General Finance Loan Co. v. General Loan (1947) 163 F2d 709, 72 L. Ed. 421.

The Court of Appeals in its discretion may consider plain error of law apparent on the face of record for purpose of avoiding manifest miscarriage of justice or where issue raised is one of public concern, even in civil case Harris v. Smith (1967) 372 F. 2d. 806.

Questions of whether there are genuine issues of fact on grounds of fraud are matters for the jury. Hartford Indem. Acc. Co. 228 F. 2d. 391 1955.

Under substantial evidence rule reviewing court shall hold unlawful and set aside lower court's action, findings and conclusions found to be unsupported by substantial evidence on the record considered as a whole.

Clearly erroneous rule is appropriate where decision was clearly against the weight of evidence.

The conventional method of testing legal sufficiency of a complaint is by filing exceptions thereto and not by seeking declaratory judgment United States v. 149 Gift Packages D.C.N.Y. (1945) 52 F. Supp. 993. Furthermore Local Rule 3(g) U.S.D.C., S.D.N.Y. provides that defendants:

> ". . . motion for summary judgement purusuant to Rule 56 of the Fed. R. Civ. P. shall annex to the notice of motion a separate, short and concise statement of the material facts as to which the moving party contends there is no

> genuine issue to be tried. Failure to submit such statement constitutes grounds for denial of the motions."

None of the defendants met this standard and in fact no defendant controverted any of the alleged facts. A complaint filed under 28 U.S.C., Sec. 2201 and Fed. R. Civ. P. for declaratory judgment on constitutional issues requires that all allegations of the complaint be accepted as true.

Questions of whether defendants pay damages resulting from injurious conduct as well as court costs is matter for jury.

And a petition for declaratory judgment need not show an accomplished injury but all other essentials of justiciable controversy must exist Perlberg v. Northwestern Mutl Life Ins. Co. D.C. Pa (1945) 82 F. Supp. 76.

II.a. MINISTERIAL DUTY BREACHED BY DISTRICT COURT WAS SANCTIONED BY COURT OF APPEALS' (2nd Circuit) ORDERS (2) ENTERED ABOUT MARCH 13, 1981 DENYING PETITIONER'S MOTIONS REQUESTING CERTIFICATION OF CONSTITUTIONAL QUESTIONS AND CORRECTION OF THE RECORD OF THE DISTRICT COURT.

II.b. THE DISTRICT COURT (MAC MAHON, Ch. J.) HAS MINISTERIAL DUTY TO PERMIT ALL OF PLAINTIFF-APPELLANT'S PAPERS TO BE ENTERED IN THE DOCKET CHRONOLOGICALLY BY RULE 79., FED. R. CIV. P. AS PER TREATMENT GIVEN TO DEFENDANTS.

During pre-trial period plaintiff-appellant made numerous inquiries as to reason his motions and papers were treated differently from those of the defendants with respect to the record. Where there was a substantial likelihood the pro se plaintiff would be irreparably harmed and further prejudiced by failure to docket his papers and motions in district court, the issue is not one of judicial discretion but of ministerial duty, or else worse.

On January 12, 1981 plaintiff provided district court with notice that there was a substanital "difference of opinion as to whether the record truly discloses what occurred below (paragraph "5")". Plaintiff cited authority of Rule 10, Rule 11(c) Fed. R. App. P. and Rule 60 Fed. R. Civ. P. The district court denied relief by order entered on January 30, 1981. Where plaintiff-appellant was forced to proceed into an appeal on docketing of the record fabricated and fragmented by the district court clerks, he was further burdened. (See Appendix E12).

Basis presented in the record shows plaintiff-appellant took exception to judicial manner as a matter of right. Col. Nat. Life Ins. Co. v. Foulke (1937) 89 F. 2d. 261, m. 382.

Questions of statutory interpretation, especially when arising in the first instance in judicial

proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the statute in question NLRB v. Heart Pub 332 U.S. 111, 88 L. Ed. 1170, 64 S. Ct. 851.

The Court's review extends to determining whether district court in arriving at its determination departed from the applicable rules. Shields v. Utah Idaho D.R. Co. 305 U.S. 177, 832 L. Ed. 111, 59 S. Ct. 160.

The Appendix to Brief filed in the Court of Appeals by Plaintiff-Appellant contains several of the motions made in the district court which support this appellant argument as does the record on its full face.

And, by letter dated October 9, 1980, sixteen (16) notices of claims, standard form 95, were deposited with John S. Martin, Jr., U.S. Attorney,

S.D.N.Y., against abusive agencies including, except not limited to, the following: "#10" on the U.S. Attorney, S.D.N.Y.; "#12" on the U.S. Marshall S.D.N.Y., and "#13" on the Clerk of the Court, S.D.N.Y. which additionally was served on October 10, 1980 through the Pro Se Office, S.D.N.Y. Then, even further pushing the issue, on October 31, 1980 the plaintiff-appellant filed an affidavit relative to those sixteen claims request an ex parte order under Rule 70, Red. R. Civ. P. to compel delivery of the sixteen documents to the agencies named.

III. WHERE COURT'S MANNER WAS PROMPTED BY WRONG MOTIVES THERE IS NOT ONLY AN ABUSE OF DISCRETION BUT THERE HAS BEEN NO EXERCISE OF DISCRETION ON THE MERITS.

Motives may sometimes be questioned where conduct of chief judge of district court was arbitrary,

capricious, without support in law or evidence, and prompted by wrongful motives. Whitney v. Morrow, 112 U.S. 693, 28 L. Ed. 871, 5 S. Ct. 333.

Because of serious nature of charge that trial judge had denied appellant fundamental right to fair trial reviewing court referred to original record. Picket v. Travelers Indemnity Co. 1960, 283 F. 2d. 835.

A court may determine whether or not discretion exists or has been exercised United States v. George S. Bush & Co. 310 U.S. 371, 84 L. Ed. 1259, 60 S. Ct. 944.

In order to maintain the correct perception of a layman prosecuting a civil rights action pro se the plaintiff cited the model cases he used to help frame his complaint, namely, 77 CIV 999 (Leonard Boudin of Counsel) and 78 CIV 2244 (Susan V.

Tipograph of Counsel). As a matter of fact, for reasons of shortness of time and expediency of the moment, this plaintiff's complaint (80 CIV 2076) contains a paragraph (¶60 at p. 60) which was borrowed in its entirety from the amended complaint (¶48 at p. 8) of Judith Clark et al. (78 CIV 2244) which in turn also appears in their complaint (¶38 at p. 8). Judicial notice of these paragraphs is hereby requested.

About mid-1980, in order to reply pro forma to plaintiff's own defendants (80 CIV 2076), the memoranda and motions of said civil action could have provided a useful sense of the requirements in law especially those of their defendant, New York Telephone Company, but unfortunately while the file for 78 CIV 2244 was generally available prior to Feburary 1980, 77Civ 999 was not.

We remind the court that plaintiff-appellant's complaint refers to an abuse, on pages 55-6, of the plaintiff by the Justice Department about May 10, 1978 almost two years before he filed his complaint or made use of the two model complaints.

Furthermore, this petitioner is familiar with textbooks such as "Practice and Procedural Forms" and the like for practicing attorneys. Nevertheless, it should be realized that the model complaints like those mentioned are not the usual type of complaint but were much needed by this petitioner.

In addition, while 77 CIV 999 was regularly without some reply brief or other matter, the file on 78 CIV 2244 for plaintiff's Judith Clark et al. was removed to a

magistrate's courtroom on the first floor. Obstinately plaintiff accepted the use of the vacant courtroom until the coercion and spooking got to be enough.

Subsequently, October 20, 1981 several of the plaintiff's of 78 CIV 2244 who also were suing the Justice Department were caught in the notorious attempted Nyack Brink's truck robbery. A reading of the complaint of Judith Clark et al. (78 CIV 2244) discloses allegations to the effect that elements of the criminal justice system impermissibly disrupt and interfere with contemplated and actual civil actions against the civil service bureaucracy.

Your petitioner, in this independent action of any of the

cases mentioned, tolerates no alleged self-serving vendetta on behalf of the civil service bureaucracy which invade his First Amendment right to petition these Courts.

Now regarding the conduct of Lloyd F. MacMahon, chief judge, and members of the Justice Department during the plaintiff's pre trail period below all the inferences cannot be drawn at this time but the United States Courts may do so. However, both the memorandum and order of the District Court and the motion and memorandum of the Federal government cite authorities which are not even remotely related to the plaintiff's case. More particularly Karlinsky v. N.Y. Racing Ass'n, Inc. 310 F. Supp. 937, 939-40 (S.D.N.Y. 1970), which

concerned the later notorious Buddy Jacobson who charged "the establishment" with antitrust violations in buying and selling of race horses and may have attempted to use the Federal Courts to review horse prices. In petitioner's brief at page 51 before the Court of Appeals this remoteness is noted.

Any vital defect such as one with respect to jurisdiction or proceudre (see Morgan v. U.S. 298 468, 80 L. Ed. 1288, 56 S. Ct. 906), bad faith (see Re McGee, 105 Kan. 574, 185 P. 14; 8 ALR 831) arbitrary or capricious action (see Kalwajtys v. Fed. Trade Comm. CA7, 237 F. 2d 654, 65 ALR 2d 220, 352 U.S. 1025, 1 L. Ed. 2d 597, 77 S. Ct. 591), or an abuse of power (see Swift v. U.S. 316 U.S. 216, 86 L. Ed. 1391, 62 S. Ct. 948) is subject to supervisory review of the Supreme Court.

In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function (Crowell v. Benson, 285 U.S. 22, 76 L. Ed. 598, 52 S. Ct. 285 and Kendall v. Beiling, 295 Ky 782, 175 S.W. 2d 489).

IV. COMPLAINT FILED UNDER SECTIONS 2201 et seq OF 28 U.S.C. IS NOT SIMPLY DISMISSED WHERE CONSTITUTIONAL QUESTION EXISTS AND PROVIDES JURISDICTION TO THE COURTS FOR DECLARATION OF RIGHTS, FURTHER RELIEF AND CREATION OF A REMEDY.

Where injunctive relief was demanded in the complaint, single judge proceeding with non-jury trial was without rational basis in law.

Where prospective relief was necessary to prevent future deprivation of plaintiff-appellant's rights, single

judge abused authority and usurpsed judicial power.

With respect to the court's order of December 5, 1980, the plaintiff took exceptions by motion of December 22, 1980 requesting amendment of said order under provisions of Sec. 1292(b), 28 USC and Rule 5(a) FRAP; plaintiff claims the court's order is interlocutory not made on the merits. Further supporting allegations were made in paragraphs "8," "9," and "10" plaintiff's motion as follows:

> 8. The memorandum of the Court with the dismissal order was not rendered within the time provided by C.P.L.R. (60) days for a determination upon the original motions for dismisssal as alleged.
> 9. Review of a refusal of district court judge to convene a three-judge district court to hear and rule on matters of injuctive relief may be had in the U.S. Court of Appeals through a certified appeal under 28 U.S.C., sec. 1292(b) AS herein requested.
> 10. The plaintiff's right to trial by jury for all issues so

> triable is preserved by Rule 38 Fed. R. Civ. P. and may not be deemed waived at this time by any stay but it demanded hereby.

Paragraph "12" of said motion mentions still another motion made on December 11, 1980 pursuant to Rule 59, Fed. R. Civ. P., requesting an amendment of the Court's dismissal order of December 5, 1980, rehearing on a new trial based on new evidence. On December 15, 1980, unaware that a judgment was issued the same day, plaintiff submitted new evidence and papers on "personal knowledge." Even on December 9, 1980 the plaintiff-appellant was submitting motions unaware that the District Court had issued the alleged interlocutory order entered on December 5, 1981.

Basis presented in the record shows plaintiff took exception to judicial manner Col. Nat. Life Ins. v. Foulke (1937) 89 F. 2d 261 m. 382.

Plaintiff took exception to manner in which case was heard in court below and issue is whether case should have been heard at law instead or before judges as suit in equity. Anderson v. Aetna Ins. Co. (1937) 89 F. 2d 345.

Motion to dismiss in an action for declaratory judgment requires that all allegations of the complaint be accepted as true and on that basis determine whether the complaint presented a cause of action under 28 U.S.C. Sec. 2201 et seq and the Rule of Fed. R. Civ. P. sec. 123 F. 2d 518 (1941); 79 Supp. 908; 28 F. Supp. 308.

An action for declaratory judgment and injunction against deprivation of civil rights is not subject to dismissal on ground that pleadings presented no justiciable

controversy where complaint plainly stated that plaintiffs were being deprived of their constitutional rights

Bush v. Orleans Parish School Bd.

(1956) 138 F. Supp. 337.

V. SINGLE JUDGE OF DISTRICT COURT USURPED 3 JUDGE COURT POWER AND BY DENIAL OF JURY TO HEAR ISSUES IN CONTROVERSY ABUSED POWER (Points I-IV).

VI. THE ABSENCE OF AN EVIDENTIARY HEARING, BECAUSE FACTUAL DISPUTE EXISTED, WAS A DENIAL OF PETITIONER'S RIGHT TO FULL AND FAIR HEARING UNDER THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE OF THE CONSTITUTION OF THE UNITED STATES (Points I-V).

VIIa. UNDER THE EMOLUMENT CLAUSE CLAIM (ARTICLE 1, SECTION 9, THE U.S. CONSTITUTION) AND U.S. STATUTES (22 U.S.C., SECTIONS 804, 2621 and 2625 and 18 U.S.C. SECTION 209(a), EMOLUMENTS SUCH AS THE NOBEL PRIZE OF 1977 TO EMPLOYEES OF THE VETERANS ADMINISTRATION ARE CONSTITUTIONALLY PROHIBITED AND SUBJECT TO JURISDICTION OF THE SUPREME COURT IN THIS CASE.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept any

present, Emolument, Office, or Title, of any kind whatever, from any king, Prince or foreign State. (Article I, Section 9)

Rosalyn Sussman Yalow accepted the Nobel Prize of 1977 in Medicine and Physiology for the development of a technology called "radio immunoassay". This technology, called "R.I.A." for short, was developed during a long course of human experimentation conducted surreptitiously by Yalow with Solomon A. Berson (deceased) at the Bronx Veterans Administration Hospital.

As alleged in paragraph 57 at page 58 of petitioners complaint their results--relating directly to this Nobel Prize--were reported in the Journal for Clinical Investigation in 1956. (J. Clin. Invest. 1956, 35, 170). Sub paragraph 57.6. at page 59 of petitioners complaint alleges that their human experimentation was clearly unrelated to

any lawful purpose. As your petitioner is a university trained physicist he offers his opinion that their reported work is without benefit of the scientific method, merit or ethics.

The Nobel Prize of 1977 in medicine and physiology to Rosalyn Sussman Yalow of the Veterans Administration by agents of Sweden in concert with the U.S. State Department and agents of the United States is now and when made in 1977 a false and fraudulent conspiracy and the named conspirators know it to be false.

VII.b. HUMAN EXPERIMENTATION CONDUCTED IN VETERANS ADMINISTRATION HOSPITALS IS IN VIOLATION OF DOMESTIC HUMAN RIGHTS AS GUARANTEED UNDER THE NINTH AMENDMENT OF THE U.S. CONSTITUTION.

VII.c. THE CONSUL GENERAL ET AL. OF SWEDEN ARE SUBJECT TO THE CONSTITUTIONAL PROHIBITIONS ON EMOLUMENTS SUCH AS THE NOBEL PRIZE.

This Petitioners personal stake in the outcome of this controversy was clearly asserted in subparagraph 58.(b) at page 59 of his complaint by alleging three (3) separate occasions during 1954-1955 (October, 1954, February 1955 and June 1955) when Rosalyn Sussman Yalow and Solomon A. Berson subjected this petitioner to intravenous radioactive iodine-131. Petitioners asserted personal interest in the outcome of this case or controversly clearly demonstrates his standing to raise the constitutional issues.

"The case or controversy requirement comes into play only when the Federal Government does something that affects a person's life, his liberty, or his property. The wrong may be grievous...The restraint on "liberty"

may be fleeting and passing and still violate a fundamental guarantee Flast v. Cohen 392 U.S. at 107.

The Veterans Administration operates the largest hospital system in these United States and carries out human experimentation surrepticiously under the law 38 U.S.C. sec. 5051 et. seq. It also operates the largest cemetary system under the law 38 U.S.C. Sec. 1000 et. seq. Petitioner alleges that such a grave conflict of interest is also unconstitutional under the Ninth Amendment and the common law.

The constitutional questions raised here and in the complaint are alleged to be of transcendental importance on fundamental issues of vital interest throughout this nation. It is for that reason that such issues should be resolved by the Supreme Court of the United States.

CONCLUSION

WHEREFORE, it is respectfully requested that the herein petition for writ of certiorari be granted on the grounds set forth herein. Oral argument requested with further relief as is just.

Respectfully submitted,

JAMES P. McDERMOTT
1774 Eastburn Avenue
Bronx, New York 10451

Petitioner proceeding pro se

Dated:

19th day of June, 1982

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -

JAMES P. MC DERMOTT, on behalf of himself and others similarly situated,

Plaintiffs

-against-

ATTORNEY GENERAL OF THE UNITED STATES; DIRECTOR OF CENTRAL INTELLIGENCE AGENCY; DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION; SECRETARY OF DEFENSE; SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; DIRECTOR OF THE NATIONAL BUREAU OF STANDARDS; DIRECTOR OF THE NATIONAL SECURITY AGENCY; SECRETARY OF STATE; SECRETARY OF THE TREASURY; DEPARTMENT OF JUSTICE; UNITED STATES POSTAL SERVICE; VETERANS ADMINISTRATION; THE UNITED STATES OF AMERICA; JIMMY CARTER; GRIFFIN BELL; JOSEPH CALIFANO; ROBERT B. FISKE, JR.; CYRUS R. VANCE; WILLIAM BOLGER; RICHARD L. ROUDEBUSH; JAMES C. CRUTCHER; ALLEN LEE REYNOLDS; PAUL NUGENT; J.J. BRENNAR; ANDREW V. SCHALLY; ROSALYN S. YALOW; ESTATE OF SOLOMON A. BERSON; UNKNOWN PAST AND PRESENT OFFICERS AND AGENTS OF THE UNITED STATES;

EUGENE STRAUS; FRANK LOVELOCK; DANIEL STONE; HUGH BARBER; WILLIE; MILLER; GUTHORN; SCHMOCKER; JOFFEE; JACOBSON: M. KOHN; J.M. TORRES; W.J. JACOBS; SOLOMON A. BERSON ESTATE; BURKE; WALD; D. Cohen; C.S. BERGMANN; JOSEPH TEDESCO; STUMP; ALPERT; OPPENHEIMER; A.M.

KLEINMAN; JULIUS WOLF; HONIGMAN; OVITZ; HOWARD FREIDMAN; LAWRENCE FEINMAN; HENRY D. JANOWITZ; MARK A. KORSTEN; CHARLES S. LIEBER; S. MATSUZKI; HERBERT G. ROSE; MARTIN AMES; MORTON KARMIOL; MILTON DREXLER; LESTER CLAHR; S.A. SCHWARTZ; P.M. FIANDUCA; TOLAND; D. KRONGOLD; W. ABLES; A. MERKER; K.H. MAC GREGOR; UNKNOWN PAST AND PRESENT V.A. PHYSICIANS and J.M. STANCIL OF THE BOARD OF VETERANS APPEALS; "JOHN DOE" V.A. AGENTS; M. BIAGGI; J. BINGHAM; D.P. MOYNIHAN; J. JAVITS; H. BADILLO; UNKNOWN PAST AND PRESENT CONGRESSMEN OF THE UNITED STATES; JAMES V. JELLISON; FRANK VIOLA; UNKNOWN PAST AND PRESENT OFFICERS AND AGENTS OF THE U.S. POSTAL SERVICE; DISABLED AMERICAN VETERANS; PAUL THOMSON; JOHN REGAN; WILFRED PUENTES ESTATE; JAMES M. WATERS; CHARLES MC LEOD; UNKNOWN PAST AND PRESENT DAY OFFICERS; FELIX S. BLOCH; LUIS I. SHIPP; DONALD T. FARLEY; ARTHUR P. WAGNER; UNKNOWN PAST AND PRESENT CONSULAR OFFICIALS OF THE UNITED STATES; CITY OF NEW YORK; ABRAHAM BEAM; EDWARD KOCH; POLICE DEPARTMENT OF THE CITY OF NEW YORK; ROBERT MC GUIRE; UNKNOWN PAST AND PRESENT OFFICERS OF THE POLICE DEPARTMENT; ENVIRONMENTAL PROTECTION AGENCY; DEPARTMENT OF SANITATION OF THE CITY OF NEW YORK; NORMAN STEISAL; AARON YALOW; UNKNOWN PAST AND PRESENT OFFICERS OF EPA AND THE DEPARTMENT OF SANITATION; DEPARTMENT OF RENT AND HOUSING MAINTENANCE; OFFICE OF RENT CONTROL; DANIEL W. JOY; ROVERT ZITNER; ELI SHUB; DEPARTMENT OF INVESTIGATIONS; MONICA BLUM; NICHOLAS SCOPPETTA; DIVISION OF VETERANS AFFAIRS; ROBERT J. DE SANCTIS; WILSON; BOARD OF ELECTIONS; ALICE SACHS; BEATRICE BERGER; HAROLD FALEK; ANGELO

DEMARCO; SANFORD GARELICK; ANTHONY BOUZA; BURTON ROBERTS; "JOHN DOES" OF THE CITY OF NEW YORK; BOARD OF HIGHER EDUCATION; ROBERT J. KIBBEE; JACQUELINE WEXLER; THOMAS C. CHALMERS; LEONARD LIEF; RICHARD M. HUBER; BERNARD J. BULKIN; BERNICE H. FLEISS; DAVID L. BEVERIDGE; JOSEPH DANNENBERG; CHARLES E. HECHT; KLAUS GROHMANN; LOUIS MASSA; JACK HERZ; PETER J. CAWS; HENRY D. JANOWITZ; E. STONE; S. COSTELLO; UNKNOWN PAST AND PRESENT OFFICERS AND AGENTS OF THE BOARD OF HIGHER EDUCATION THE STATE OF NEW YORK; the GOVERNOR; the SECRETARY OF STATE; ROBERT ABRAMS; the ATTORNEY GENERAL; THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK; REPUBLIC OF SWEDEN; CONSUL GENERAL OF SWEDEN; KAROLINSKA INSTITUTE; NOBEL PRIZE TRUSTEES; UNKNOWN PAST AND PRESENT AGENTS OF THE NOBEL PRIZE COMMITTEE; GOVERNMENT SAVINGS AND LOAN; ARTHUR J. PHELAN, JR.; TERRY SULLIVAN; CITIBANK, NA; WALTER B. WRISTON; CITIBANK, NA BOARD OF TRUSTEES; CITICORP; BANCO POPULAR DE PUERTO RICO; EDGARDO N. VASQUEZ; RAMON FELICIANO; CONSOLIDATED EDISON CO., N.Y.; CHARLES L. LUCE; JOHN SAWHILL; GEORGE J. DELANEY; UNKNOWN PAST AND PRESENT OFFICERS AND AGENTS OF CON EDISON; ANN-GUR REALTY CORPORATION; MARVIN YASGUR; IRVING YASGUR; HAROLD DIAMOND; VICTOR "DOE" AND UNKNOWN PAST AND PRESENT AGENTS OF YASGUR ET AL.; BRONX-LEBANON HOSPITAL CENTER; FRED SILVERMAN; SCHAFFLER; UNKNOWN PAST AND PRESENT OFFICERS: MONTEFIORE HOSPITAL AND MEDICAL CENTER; MARTIN CHERKASKY; MARY ANNE MULLEN AND UNKNOWN PAST AND PRESENT OFFICERS AND AGENTS; ROCKEFELLER UNIVERSITY HOSPITAL; ATTALLAH KAPAS; NUALLAH AND UNKNOWN PAST AND PRESENT OFFICERS; MEMORIAL HOSPITAL

FOR CANCER AND ALLIED DISEASES; GLENN A. WASSELMANN; MILDRED SKLENA; NEW YORK UNIVERSITY; BOARD OF TRUSTESS; JOHN M. SCHIFF; IVAN L. BENNETT; LYLE BORST; JAMES M. HESTER; ALBERT AND MARY LASKER FOUNDATION; MICHAEL DEBAKEY; BOARD OF TRUSTEES OF LASKER FOUNDATION; MARY LASKER; Defendants

B5

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of November, one thousand nine hundred and eighty-one,

Present: HONORABLE J. EDWARD LUMBARD,
HONORABLE JON O. NEWMAN,
Circuit Judges.

HONORABLE ROBERT C. ZAMPANO,
District Judge.

- -x

JAMES P. MC DERMOTT
Plaintiff-Appellant,

v.

ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,
Defendants-Appellees.

- -X

81-6041

O R D E R

James P. McDermott appeals from a judgment entered December 15, 1980, in the District Court for the Southern District of New York (Lloyd F. McMahon, Chief Judge), dismissing his complaint pursuant to Fed. R. Civ. P. 12(b)(6) because of a total failure to comply with the requirement of Fed. R. Civ. P. 8(a) that the complaint set forth a short and plain statement showing that the pleader is entitled to relief. The complaint contains more than 60 pages describing an assortment of alleged grievances against scores of officials from Veterans' Hospital personnel to the President of the United States and covering a time span from the 1940's to 1977. Among the grievances is the award of a Nobel prize in medicine to three staff members at a Veterans Hospital. Despite the latitude

accorded to pro se litigants, we agree with Chief Judge MacMahon that this complaint exceeds even generous limits for the type of document appropriate to commence a lawsuit in a federal district court.

The judgment dismissing the complaint is affirmed.

/s/ J. Edward Lumbard
Circuit Judge

/s/ Jon O. Newman
Circuit Judge

/s/ Robert C. Zampano
District Judge

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- X

JAMES P. MC DERMOTT, on the behalf of himself and others similarly situated,
Plaintiffs-appellants,

-v-

ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA and the defendants named on the appended rider,
Defendants-appellees, - - X

CLASS ACTION

Docket Number: 81-6041

Judges: J. EDWARD LUMBARD,
JON O. NEWMAN,
Circuit Judges;

ROBERT C. ZAMPANO,
District Judge.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that JAMES P. MC DERMOTT, plaintiff-appellant above-named, appeals to the Supreme Court of the United States from the final decision and order of the United States Court of Appeals for the

Second Circuit dismissing his Petition for Rehearing on January 28, 1982, which affirms in part the original decision and order of Chief Judge of the U.S.D.S. (S.D.N.Y.) entered December 5, 1980 followed by the judgement entered on December 15, 1980 (80 CIV 2076).

This appeal is taken pursuant to provisions of the United States Code (U.S.C.) including, but not limited to, any of the following sections of Title 28: 1251 (a)(2), 1251 (b)(1), 1252, 1254 (1), 1254 (2) and 1254 (3), respectively.

22th day of February, 1982.

Notice to:

(as per attached schedule)

Signed /s/ James P. McDermott

Address James P. McDermott
1774 Eastburn Avenue
Bronx, New York 10457

D10

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

As a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-eighth day of January, one thousand and nine hundred and eighty [two].

Present: HONORABLE J. EDWARD LUMBARD
HONORABLE JON O. NEWMAN,
Circuit Judges.

HONORABLE ROBERT C. ZAMPANO,
District Judge.

- -X

JAMES P. MC DERMOTT,

Plaintiff-Appellant,

v.

ATTORNEY GENERAL OF THE UNITED STATES, et al.,

Defendants-Appellees.

- -X

81-6041

A petition for a rehearing having been filed herein by appellant, James P. McDermott, pro -se,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

/s/ by Francis X. Gindhart
Chief Deputy Clerk

JAMES P. McDERMOTT v. ATTORNEY GENERAL OF THE UNITED STATES, et al.
80 Civ. 2076 (LFM) (Pro Se)

ENDORSEMENT

Plaintiff, proceeding pro se, moves under Rule 11(c), Fed. R. App. P., for an order directing the clerk of our court to temporarily retain the record of this case, which is now on appeal before the Court of Appeals, in the district court. We deny the motion.

Plaintiff fails to provide the court with any reason why this record should be temporarily retained in our court. Assuming plaintiff presumes that transmission of the record would inconvenience him in preparing his case for appeal, we inform him that the Court of Appeals is located within the same building as the district court. Hence, since we are unable to ascertain any reason

for retaining the record of this case in the district court, we deny the motion.

Motion denied.

So ordered.

Dated: New York, New York
January 30, 1981

/s/ Lloyd F. MacMahon
LLOYD F. MacMAHON
Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES P. MC DERMOTT,
Plaintiff-Appellant

v.

ATTORNEY GENERAL OF THE UNITED STATES, et al.,
Defendants-Appellees.

Docket Number: 81-6041

NOTION OF MOTION
for CORRECTION OR MODIFICATION
OF THE RECORD UNDER RULE 10(e)
Fed. R. App. P.

MOTION BY:

James P. McDermott
1774 Eastburn Avenue
Bronx, New York 10457

Judge or Agency whose order is being appealed:

Lloyd F. MacMahon, S.D.N.Y.

Brief statement of the relief requested:

Correction or modification of the record is requested under rule 10(e) Fed. R. App. P. amending the District Court docket sheet, amending the District

Court listing or index of the record transmitted reasonably designating the full record.

Previous requests for similar relief and disposition:

None.

Statement of the issue(s) presented by this motion:

Whether the Court of Appeals should exercise its discretion to make the record conform to the truth as to whether the record truly discloses what occurred in the District Court.

Brief statement of the facts (with page references to the moving papers):

The record transmitted is not complete for purposes of appeal and the entire District Court docket sheet is a misstatement under Rule 79(a) Fed. R.

Civ. P. and the index of documents transmitted to the Court of Appeals propagates all the errors of the docket sheet; it is not practicable to state the differences until gross amendments are made in the record by the District Court.

Summary of the argument (with page references to the moving papers):

Rule 79(a) Fed. R. Civ. P. requires that docket entries be made in chronological order and in an orderly manner. Since the plaintiff pro se must include in the record to Court of Appeals all of the record upon which the District Court may have based its findings and since a frivolous dismissal does not positively state findings the record therefore needs to be amended. Furthermore, the

chedule of plaintiff's documents filed in the District Court is annexed hereto.

February 28, 1981
Date

/s/ James P. McDermott
Attorney for JAMES P. McDERMOTT

ORDER

IT IS HEREBY ORDERED that the motion for correction of the record on appeal be and it hereby is denied

/s/ Amalya L. Kearse
AMALYA L. KEARSE
Circuit Judge

March 13, 1981
Date

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- -X

JAMES P. McDERMOTT,
Plaintiff-Appellant,

v.

ATTORNEY GENERAL OF THE UNITED STATES, et al.,
Defendants-Appellees

- -X

CLASS ACTION

81 6041

State of New York)
) ss:
County of New York)

JAMES P. McDERMOTT, being duly sworn, says:

1. Affiant is the plaintiff pro se herein and his brief is due on or before 3-11/81.

2. Affient's complaint was suddenly dismissed as "frivolous" on December 5, 1980 after an undue delay of about 230 days without reasonable explanation of the manner in which

conclusions were reached and without specifically defining the facts relied upon. And, there was apparently no substantial inquiry into the relevant facts while the authorities cited were not even remotely related to the plaintiff's case.

3. Subsequent to December 5, 1980 the plaintiff's documents came down from chambers to the document file (Room 10) in such a manner as to cause the clerks to make erroneous entries on the docket sheet, including, without limitation, the following:

(a) About twenty records are assigned an erroneous date of entry as "12-5-80."

(b) About thirteen records have apparently not been assigned any entry number ("NR").

4. The docket sheets of the district court are herein designated as exhibit "U" (copy annexed).

5. The list or "Index" to the record on appeal is herein designated as exhibit "V" (annexed). Erroneous entries on the index were carried over from the erroneous docket sheet, including, without limitation, the following:

(a) About fifteen entries with the erroneous date of entry "12-5/80."

(b) Numerous entries are not even dated.

6. The preliminary schedule of the plaintiff's documents as made up from the receipted copies of his filings is herein designated as exhibit "W" (copy annexed). Apparently, the plaintiff filed over thirty

documents with the court.

7. Clearly the record transmitted is not complete for purposes of the appeal.

8. Clearly the index or list of documents transmitted is not identified with reasonable definiteness pursuant to Rule 11(b), Fed. R. App. P.

9. Clearly the entire district court docket sheet is a misstatement under Rule 79.(a), Fed. R. Civ. P.

10. Clearly it is not practicable to to stipulate the differences under Rule 10(e) Fed. R. App. P. and it would require an inordinate amount of time and effort on the part of the plaintiff causing a delay in the appeal.

WHEREFORE the plaintiff prays that the Court of Appeals will direct the clerks of the district court to

1) amend the district court docket sheet in conformity with a public record andplaintiff's exhibit "W";

2) issue a supplemental record; and

3) amend the listing or index of the record as transmitted in conformity with the amended docket sheet and the schedule of plaintiff's filings in exhibit W.

Dated: February 28, 1981

/s/ James P. McDermott

JAMES P. McDERMOTT
1774 Eastburn Avenue
Bronx, N.Y. 10457

Subscribed and sworn before me on the 2nd day of March, 1981

/s/ Bernard P. Rose

BERNARD P. ROSE
NOTARY PUBLIC, State of New York
No. 41-8639225
Qualified in Queens County
Commission Expires March 30, 1984.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -X

JAMES P. MC DERMOTT,
Plaintiff-appellant :

-v- :

ATTORNEY GENERAL OF THE UNITED STATES, ET AL., :
Defendants-appellees. :

- -X

Docket No. 81-6041

NOTICE OF MOTION FOR CERTIFICATION UNDER 28 U.S.C., 2403(a), 2403(b), RULE 44, FED. R. APP. P., OF CONSTITUTIONAL QUESTIONS

Brief statement of the relief requested:

Appellant pro se requests certification of constitutional questions under 28 U.S.C., Sec. 2403(b), Rule 44, Fed. R. App. P. and 28 U.S.C. 2403(b) to the Attorneys General of the United States and of New York State.

Previous requests for similar relief and disposition:

Aborted notice filed February 20,

1981.

Statement of the issue(s) presented by this motion:

Whether the Clerk of the Court of Appeals should certify to the Attorneys General of the United States and the State of New York that the appellant will draw into question in this appeal the constitutionality of issues and statutes affecting public interest in the matter of human rights violations, human experimentation and subversion by public officers.

Brief statement of the facts (with page references to the moving papers):

Plaintiff was subjected to unwarranted, mindless surgical procedure putting the quest for knowledge before the benefit to plaintiff or wisdom. Less than ten (10) years later, in order to increase the skills of

surgeons, a Mr. G. Christopher was subjected to the same procedure with different motive. It is requested that there be judicial notice of Christopher. [Christopher v. U.S. 237 F. Supp. 787 (1965)] and the remarkable similarities with plaintiff's history excepting different morbidities of paraplegia and ulcerative colitis (at p. "7").

Summary of the argument: The maxim "Ubi jus ibi remedium" states wherever there has been an outrage there must be a remedy to redress the wrong (at p. "4"). Personal security is the absolute right to the uninterrupted enjoyment of life and limbs, body, health, treatment and reputation. Absolute personal liberty braces more than freedom from physical restraint but is deemed to embrace the right to be free to the

enjoyment of the faculties with which he has been endowed by his Creator (at p. "6").

February 28, 1981
Date

/s/ James P. McDermott
Attorney for JAMES P. MC DERMOTT

ORDER

IT IS HEREBY ORDERED that the motion for certification of constitutional questions be and it hereby is DENIED

/s/ Amalya L. Kearse
Circuit Judge

Alk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

JAMES P. McDERMOTT,

Plaintiff,

-against-

ATTORNEY GENERAL OF THE UNITED STATES, et al.,

Defendants.

----------x

MEMORANDUM and ORDER
80 Civ. 2076 (LFM)

MacMAHON, Chief Judge.

Plaintiff, acting pro se, brings suit against some 200 named defendants, including the Attorney General of the United States, President Carter, certain Secretaries of State, Treasury, Education and Welfare; various federal and local agencies, and sundry public officials, institutions and organizations. Plaintiff seeks, inter alia, injunctive relief, money damages of $30,000,000

and an order revoking the 1977 Nobel Prize in medicine and physiology. Several defendants have moved under Fed. R. Civ. P. 12(b)(6) to dismiss the complaint for failure to state a claim upon which relief may be granted.

Fed. R. Civ. P. 8(a) requires that a complaint set forth a "short and plain statement showing that the pleader is entitled to relief." The rule calls for pleadings which permit the court and the defendants to discern what the complaint charges and who is being charged, so that the issues may be identified for meaningful discovery and intelligible presentation to the trier of fact. Karlinsky v. New York Racing Ass'n, Inc., 310 F.Supp. 937, 939-40 (S.D.N.Y. 1970).

Complaints which do not comply with this rule are subject to dismissal

under Fed/ R. Civ. P. 12(b)(6). Karlinsky, supra; 2A Moore's Federal Practice 8.13 at 8-121 to 8-127.

Dismissal clearly is required here. The complaint broadly asserts that "[d]efendants have conceived and implemented a plan and actions which violated the plaintiff's constitutional and civil rights." Complaint at 2. After 16 pages devoted principally to a listing of the parties, plaintiff presents a fifty-page narrative under the heading of "The Facts" which purports to state his allegations. This prolix statement is a frivolous biographical account, interspersed with a variety of scientific and historical information, jumbled together willy-nilly and without benefit of any order. Many defendants are never mentioned, and those

who are mentioned have only an incidental involvement in the events chronicled.

Despite plaintiff's verbosity, we are unable to ascertain any claim upon which relief may be granted, other than a broad allegation of an undefined conspiracy. Moreover, we cannot identify the relevance of any of the 26 statutes which the plaintiff pleads, or which of those statutes has been allegedly violated by any individual defendant. The universality of plaintiff's complaint, and ergo its frivolousness, is indicated by plaintiff's statement that "it is better to state what the plaintiff has not claimed rather than re-state the pleading." Plaintiff's Memorandum of Law in Opposition to Defendant's Motion

[To Dismiss the Complaint] at 2.

Although pro se complaints must be accorded a liberal and sympathetic reading by the court, Haines v. Kerner, 404 U.S. 519 520-21 (1972), the limits of the mandate are reached when neither the Court nor the defendants can even vaguely discern any basis for granting the plaintiff the relief which he has requested. In view of the nature and content of plaintiff's complaint, we grant defendants' motions to dismiss the complaint in all respects, Prezzi v. Schelter, 469 F.2d 691 (2d Cir. 1972), cert. denied, 411 U.S. 935 (1973), and also dismiss the complaint as frivolous with respect to all defendants. 28 U.S.C. 1915(d).

All other motions are dismissed as moot.

We further certify that any appeal from this order in forma pauperis would not be taken in good faith since an appeal would be frivolous. 28 U.S.C. 1915(a); Coppedge v. United States, 369 U.S. 438 (1962).

So ordered.

Dated: December 3, 1980.

/s/ Lloyd F. MacMahon

LLOYD F. MacMAHON
Chief Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES P. McDERMOTT,

Plaintiff,

-against-

ATTORNEY GENERAL OF THE UNITED STATES, et al.,

Defendants.

---

80 CIVIL 2076 (LFM)

JUDGMENT

Several defendants having moved pursuant to Rule 12(b)(6), of the Federal Rules of Civil Procedure to dismiss the complaint, and the said motion having come before the Honorable Lloyd F. MacMahon, Chief Judge, U.S.D.C., and the Court thereafter on December 5, 1980, having handed down its memorandum and order granting the said motion and dismissing the complaint as frivolous with respect to all defendants, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed as frivolous, and it is further,

ORDERED: That all other motions are dismissed as moot.

Dated: New York, N.Y.
December 15, 1980

/s/ Raymond F. Burghardt
Clerk

Office - Supreme Court, U
FILED
JUL 28 1982
ALEXANDER L. STEVA
CLERK

82-190

No.

IN THE

Supreme Court of the United States

October Term, 1982

JAMES P. McDERMOTT,

Petitioner,

v.

ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,

Respondents.

Opposition to Petition for a Writ of Certiorari

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No.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM 1982

JAMES P. MCDERMOTT,

Petitioner,

v.

ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,

Respondents.

Opposition to Petition for a Writ of Certiorari.

Preliminary Statement.

Respondents Rosalyn Yalow, Eugene Straus, Martin Cherkasky, Montefiore Hospital and Medical Center, Bronx-Lebanon Hospital and Fred Silverman, respectfully pray that the petition for writ of certiorari submitted by the petitioner, James McDermott, be denied in all respects. The petition sets forth no valid grounds for granting certiorari. Petitioner who has appeared *pro se,* claims alleged violations of his constitutional rights arising under the First, Fourth, Fifth, Ninth and Fourteenth Amendments and various enumerated federal statutes. The District Court found that the plaintiff-petitioner's

allegations failed to state a claim upon which relief could be granted and dismissed the complaint as frivolous as to all defendants. Further, the court certified that any appeal from such order *in forma pauperis* would not be taken in good faith. The claims made by the petitioner were reviewed by the Court of Appeals and were the subject of an additional, unsuccessful application for re-review by that court when it considered his petition for rehearing. It is respectfully submitted that the petitioner's claims have been given full and fair review by both the District Court and the Court of Appeals, both of which correctly concluded that the complaint fails to set forth a cause of action upon which relief can be granted. Accordingly, this case does not merit the granting of a writ of certiorari.

Statement of Facts.

The instant action evolves from a suit brought against some 200 named defendants[1] wherein the plaintiff seeks declaratory and injunctive relief as well as Thirty Million Dollars ($30,000,000.00) in damages for the alleged violation of his constitutional rights. The accusatory pleading avers that the intendment of the action is to:

> [R]edress past and present deprivation and prevent future deprivation by defendants and their agents, acting under color of State and federal law, statute, ordinace [*sic*], regulation, custom an [*sic*] usage of right, privileges and immunities secured by the United States Constitution, the Amendments thereto federal and state statutes and the Common Law. [¶3][2]

---

[1]Point V of petitioner's reply brief before the Court of Appeals reduced the number of defendants. It is, however, respectfully submitted that the reduction in the number of defendants in no way affects the nature of the plaintiff-petitioner's accusatory pleading.

[2]The parenthetical references to numbered paragraphs refer to the paragraphs in the complaint.

Even with due deference afforded to the petitioner's *pro se* status, it must nonetheless be noted that the nature and quality of the complaint and the Petition makes any meaningful presentation of the facts a Herculean task. To the extent that the meaning and import of the allegations contained in the 69 page, 89 paragraph accusatory pleading can be discerned, they are so disjointed as to defy logical recitation. On appeal to the Court of Appeals, plaintiff-petitioner submitted a 52 page appellate brief containing 44 pages restating and supplementing the purported "facts." The accusatory pleading and appellate brief are essentially in the nature of a biographical treatise, wherein the plaintiff recounts every event during the past thirty years which has caused him annoyance or distress. The main thrust of the action, to the extent it can be identified, is a claim of an ill-defined conspiracy in which callous officials of the United States Government and private individuals purportedly participated with the intent to deny the plaintiff his constitutional rights.

Plaintiff's requests for relief include a demand for a declaration of the unconstitutionality of enumerated statutes [¶89(a), (b) and (c)], a permanent injunction against all defendants, with particular reference to the performance of medical experimentation [¶89(2)], a repudiation and revocation of the 1977 Nobel prize in Medicine [¶82(3) (b) and (c)] and Thirty Million Dollars ($30,000,000.00) in damages.

Petitioner identifies himself as a former member of the United States Armed Forces, who was hospitalized in a Veterans Administration Hospital and who was a member of a class of persons allegedly subjected to human experimentation there in December of 1977 [¶5]. The plaintiff, in his class allegation, claims that he also sues on behalf of all persons who were the subject of human experimentation on October 21, 1948, by agents of the

Veterans Administration [¶5]. Thus, the complaint initially targets October, 1948 and December, 1977 as the two operative dates; the remaining allegations in the accusatory pleading also attempt to document a variety of collateral grievances allegedly arising during the intervening years.

In addition, the complaint makes repeated references to various conspiratorial efforts identified by the home grown acronyms of SHARE [¶11], SWEDE [¶56] and ULTRA [¶35].

The complaint fails to indicate either the purpose of the purported conspiracy or any specific acts in furtherance thereof; however, petitioner does assert that numerous defendants participated therein. A review of the accusatory pleading reveals it to be a compendium of bizarre and disjointed allegations joined together by the all-pervasive claim of conspiracy.

Defendant-respondents Rosalyn Yalow, Eugene Straus, Martin Cherkasky and Montefiore Hospital and Medical Center were served on or about September 12, 1980. Defendant-respondents Bronx-Lebanon Hospital Center and Fred Silverman were served on or about October 28, 1980. Both groups of defendant-respondents moved to dismiss the complaint pursuant to Rule 12(b) (6) of the Fed.R.Civ.P. contending that the accusatory pleading failed to state a cause of action upon which relief could be granted. The District Court (MacMahon, Ch. J.), by Memorandum and Order dated December 3, 1980, granted the defendants' motion and dismissed the complaint as frivolous with respect to all defendants. Further, the court certified that any appeal from such order *in forma pauperis* would not be taken in good faith. Judgment, dismissing the complaint was filed on December 15,

1980. The Memorandum and Order of the District Court appear on pp. H27-H32 of the petition. A reading of the court's Memorandum Decision clearly reveals that the District Court reviewed plaintiff's claims of alleged constitutional and federal statutory violations, premised on in excess of thirty distinct federal statutes, and found them to be without merit. In its review, the District Court succinctly stated:

> Moreover, we cannot identify the relevance of any of the 26 statutes which the plaintiff pleads, or which of those statutes has been allegedly violated by any individual defendants [Memorandum and Order].[3]

The dismissal of the complaint as frivolous was based on Judge MacMahon's determination that the complaint failed to comply with Fed.R.Civ.P.8(a) which requires a plain and simple statement of the facts showing that the pleader is entitled to relief. In rendering its decision, the District Court correctly considered the standard of pleading applicable to a complaint, like the one at bar, which has been prepared by a *pro se* plaintiff [Memorandum and Order]. The District Court's further determination that an "appeal *in forma pauperis* would not be taken in good faith since an appeal would be frivolous" is fully consistent with the court's decision.

Subsequent to the court's dismissal of the complaint as to all defendants, the plaintiff appealed to the Court of Appeals for the Second Circuit. Petitioner there claimed that the District Court's dismissal of the complaint was improper. In connection therewith, he moved for an order pursuant to Rule 11(c) of the Fed.R.App.P. for an order

[3]Parenthetical references to "Memorandum and Order" refer to the Memorandum and Order of Judge MacMahon, dated December 3, 1980, which appears at pages H27-H32 of the Petition.

directing the clerk of the District Court to temporarily retain the record of this case. This motion was denied by Judge MacMahon. The Endorsement of the court, which appears at p. E12 of the petition, clearly states that the plaintiff failed to provide the court with any reason for retaining the record in the District Court.

Pending the appeal, petitioner also moved in the Court of Appeals for an order correcting the Record on Appeal, pursuant to Fed.R.App.P. 10(e) and for certification of constitutional questions. Both motions were denied by the Court of Appeals. These orders of the Court of Appeals appear at pp. F17 and G26, respectively, of the petition.

On appeal, the Court of Appeals for the Second Circuit affirmed the District Court's dismissal of the complaint, based on the plaintiff's total failure to comply with the requirements of Fed.R.Civ.P. 8(a). In so holding, the Court of Appeals concurred in Chief Judge MacMahon's determination that despite the latitude accorded to *pro se* litigants, the complaint exceeded "even generous limits for the type of document appropriate to commence a lawsuit in a federal district court." The order of the Court of Appeals for the Second Circuit appears at pp. B6-B7 of the petition.

Plaintiff-petitioner then sought rehearing of his case before the Court of Appeals. After consideration, the petition for rehearing was denied. The order of the Court of Appeals for the Second Circuit denying rehearing appears at pp. D10-D11 of the petition. It is from this determination that the petitioner now seeks review.

Reasons for Denying the Petition.

The petition presents nothing more than another attempt by the petitioner to seek further review of his vague

and bizarre allegations of conspiracy, which were found to be frivolous by both the District Court and the Court of Appeals for the Second Circuit.

The defendant-respondents, out of respect for the court and the plaintiff *pro se,* have endeavored to treat the allegations and purported issues raised thereby in a careful and thoughtful manner. However, no amount of deference to the petitioner's *pro se* status, nor charity of interpretation, can serve to exact a cognizable claim from the accusatory pleading. In assessing the purported claims of the plaintiff *pro se,* the District Court properly took note of the fact that Rule 8(a) of the Fed.R.Civ.P. requires that there be a plain and short statement showing the pleader's entitlement to relief [Memorandum and Order]. Clearly, as the District Court noted, this rule demands pleadings which permit the defendants and the court to determine the nature of the charges and to discern which, if any, of the defendants is being charged. *Walter Reade's Theatres, Inc. v. Loew's, Inc.,* 20 F.R.D. 579 (S.D.N.Y. 1957). There can be no serious dispute that the complaint defies rational interpretation.

As stated above, the District Court, in rendering its decision, properly considered the standard of pleading applicable to a complaint like the one at bar prepared by a plaintiff *pro se* [Memorandum and Order]. In this regard, this Court has held that in considering the sufficiency of a *pro se* complaint, the accusatory pleading is held to a lesser standard than pleadings prepared by an attorney. *Haines v. Kerner,* 404 U.S. 519, *reh. denied,* 405 U.S. 948 (1972). The Court of Appeals, in affirming the District Court's dismissal of plaintiff's complaint, held that even under these liberalized standards, plaintiff's accusatory pleading failed to state a cause of action upon which relief could be granted [Order]. *United States v. Dolan,* 452

F.2d 1078 (3d Cir. 1971). *Accord, Gray v. Creamer,* 465 F.2d 179, 182 n.2 (3d Cir. 1972). Where a pleading, such as the one at bar, contains only broad conclusory allegations which fail to set forth facts in support thereof, it is subject to dismissal. *See, DeFina v. Latimer,* 79 F.R.D. 5 (E.D.N.Y. 1977); *Campbell v. Patterson,* 377 F.Supp. 71 (S.D.N.Y. 1974).

Petitioner's claims of conspiracy are not premised on any allegations of overt acts; in fact, rather than reciting a conspiracy and the acts done in furtherance thereof, the petitioner engages in a reverse thought process: he recites countless unconnected "acts" and relates them with a meaningless claim of conspiracy. This is a complete distortion of the charge of conspiracy. Moreover, a claim of civil conspiracy requires a showing of an agreement between the parties to effect a wrong against another or to cause some injury, which results in damage. *Rotermund v. U.S. Steel Corp.,* 474 F.2d 1139 (8th Cir. 1973). The complaint at bar is devoid of any allegation of agreement, nor does it provide even a scintilla of circumstantial evidence of a single plan, the fundamentals of which were known to each person who is to be held liable for its consequences. Such a showing is an essential element to plead conspiracy. *Hoffman-LaRoche, Inc. v. Greenberg,* 447 F.2d 872 (7th Cir. 1971). Petitioner's conclusory and vague allegations of conspiracy were, in fact, doomed to fail. The claims of conspiracy proffered by the petition were totally without foundation or support. The District Court concluded that:

> [N]either the Court nor the defendants can even vaguely discern any basis for granting plaintiff the relief requested [Memorandum and Order].

The fact that plaintiff-petitioner has failed to allege any cognizable claim upon which relief can be granted is fully

borne out by the record. Petitioner's morass of allegations, as well as his status as a *pro se* litigant, were appropriately and thoughtfully considered by the District Court. Thereafter, plaintiff's claims were subjected to appellate review and were twice rejected by the Court of Appeals as lacking in merit. Therefore, unless the petitioner's *pro se* status alone entitles him to yet further review, it is respectfully submitted that this case fails to present any basis for the granting of a writ of certiorari.

Conclusion.

For these reasons, the plaintiff-petitioner's petition for a writ of certiorari should be denied.

Respectfully submitted,

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